

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AFFYMETRIX, INC., :
: Plaintiff, :
: v. : Civil Action No. 04-901 JJF
: :
ILLUMINA, INC., :
: Defendant. :
:

O R D E R

WHEREAS, Defendant filed a Motion To Dismiss Affymetrix' Count 2 For Lack Of Standing And Subject Matter Jurisdiction (D.I. 234);

WHEREAS, Defendant contends that Plaintiff owns no rights in the '716 patent and, therefore, Count 2 of Plaintiff's Complaint, which alleges infringement of the '716 patent, must be dismissed;

WHEREAS, the question of ownership of the '716 patent hinges on the operation of the 1991 Consultant Services Agreement (the "1991 Agreement") (D.I. 246, Ex. 2) between Daniel H. Wagner Associates ("Wagner") and Affymax Research Institute ("ARI");

WHEREAS, the Court concludes that Section 2 of the 1991 Agreement, "Ownership of Work Product" was in effect at the time of conception of the invention claimed in the '716 patent because Section 10 of the 1991 Agreement provides that Section 2 survives termination of the agreement;

WHEREAS, the Court finds that additional briefing on the remaining issues is necessary;

NOW THEREFORE IT IS HEREBY ORDERED that:

1. No later than **Thursday, June 29, 2006**, Defendant shall file a brief addressing the following two issues:

a. Whether the conception of the invention claimed in the '716 patent was "work product" under the definition given in Section 2 of the 1991 Agreement;

b. Whether the first sentence of Section 2 of the 1991 Agreement is a present assignment of future inventions or an agreement to assign in the future;

2. No later than **Friday, July 7, 2006**, Plaintiff shall file an answer to Defendant's brief;

3. No reply brief shall be filed.

June 22, 2006
DATE


UNITED STATES DISTRICT JUDGE